EXXON CHEMICAL (MALAYSIA) SDN BHD

v.

MENTERI SUMBER MANUSIA, MALAYSIA & ORS

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ABDUL KADIR SULAIMAN JCA
ABDUL AZIZ MOHAMAD JCA
[CIVIL APPEAL NO: W-01-23-1999]
11 DECEMBER 2003

LABOUR LAW: *Industrial Court - Reference - Appeal - Appeal against dismissal of application of certiorari to quash Minister's reference to Industrial Court - Industrial Court was referred dispute pertaining to retrenchment of respondents by appellant company - Whether Minister properly exercised his discretion in referring dispute to Industrial Court - Whether respondents' receipt of retrenchment benefits acted as an estoppel against them - Industrial Relations Act 1967, ss. 20(3), 30(5)*

The appellant company had applied to the High Court for an order of *certiorari* to quash the decision of the Minister of Human Resource (the 1st respondent) to refer the dispute between the appellant and the 2nd, 3rd and 4th respondents ('affected respondents') to the Industrial Court (the 5th respondent). The dispute between the said parties was due to the appellant's retrenchment of the affected respondents. The learned judge dismissed the application. Hence, this appeal to the Court of Appeal. The issues were: (1) whether the Minister had properly exercised his discretion under s. 20(3) of the Industrial Relations Act 1967 ('the Act') in deciding to refer the case to the Industrial Court; (2) whether the learned judge had erred on the burden placed on the Minister upon the exercise of such a discretion; (3) whether exh. LAL4 which provided an avenue for the affected respondents to be absorbed into the appellant's affiliate companies was prepared without the knowledge of the appellant; and (4) whether the fact that the affected respondents had received their retrenchment benefits acted as an estoppel against them.

Held:
Per Abdul Kadir Sulaiman JCA (majority)

[1] Under s. 20(3) of the Act, the Minister is vested with the discretion to refer or to refuse the representations made by a workman to the Industrial Court for an award upon receiving the notification of the Director-General that the latter is satisfied that there is no likelihood of the representations

being settled. The Minister will exercise his discretion to refer such representations to the Industrial Court only 'if he thinks fit' to do so. Otherwise, he has every reason not to do so. In the event the Minister decides not to refer the dispute to the Industrial Court, the worker or employee will be left without any other recourse concerning his grievances against the employer. (p 456 b-e)

[2] It was fitting of the Minister to refer the representations to the Industrial Court for an award after finding the existence of a serious issue to be resolved upon consideration of the facts presented to him. The records showed that there was indeed a serious issue that could only be resolved by the Industrial Court. Hence, in the proper exercise of the powers given to the Minister, there was nothing left for him but to refer such representations to the Industrial Court for an award. (p 458 g-h)

[3] The learned judge was merely making a comparison on the onerous burden placed upon the Minister when called upon to exercise his discretion under s. 20(3) of the Act. He had not erred to such an extent that this appeal ought to be allowed on that ground. Also, in his grounds of judgment, the learned judge did not imply that the Minister was not obliged to take a meticulous examination of the facts when he decides to refer a case to the Industrial Court. Unless it is clear to the Minister that a representation notified to him is frivolous or vexatious in nature, he should examine the facts so as to enable him to decide one way or another on the fate of the representation. (pp 459 f-g & 460 a-f)

[4] The appellant's submission that the appellant had no control over its affiliate companies to absorb the affected respondents had no merit in view of exh. LAL4 which provided an avenue for the affected respondents to be absorbed into the said affiliate companies. Further, exh. LAL4 would have been brought before the Director-General in the reconciliation proceedings. Therefore, there was no merit in the appellant's submission that exh. LAL4 was unilaterally prepared for the affected respondents without the knowledge of the appellant. (pp 460 g-h & 461 a-b)

[5] The fact that the affected respondents had received their retrenchment benefits from the appellant did not act as an estoppel against them in relation to the representations. Estoppel does not apply to industrial adjudication in the light of s. 30(5) of the Act. (p 462 c)

Per Abdul Aziz Mohamad JCA (dissenting)

[1] Although the learned judge was satisfied that the decision of the Minister was correct and proper, the contents of his grounds of judgment were not demonstrative of a meticulous examination of facts having been taken. A meticulous examination of the documents before the Minister would have revealed a clear case of a *bona fide* retrenchment. Had the Minister and the learned judge considered what the affected respondents stated and alleged, they would have seen that the statements and allegations were frivolous. The Minister had taken into account irrelevant considerations, thereby failing to take into account proper considerations that should have weighed on his mind. It followed that his decision ought to be quashed and the appeal ought to be allowed. (pp 464 d-f, 468 c, 469 b & 472 b-c)

[Appeal dismissed by a majority.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Syarikat perayu telah memohon kepada Mahkamah Tinggi untuk perintah *certiorari* bagi membatalkan keputusan Menteri Sumber Manusia (responden pertama) kerana merujuk pertikaian di antara perayu dengan responden kedua, ketiga dan keempat ('responden-responden yang terjejas') kepada Mahkamah Perusahaan (responden kelima). Pertikaian di antara pihak-pihak adalah berpunca dari pembuangan kerja responden-responden yang terjejas oleh perayu. Yang arif hakim menolak permohonan dan akibatnya perayu merayu ke Mahkamah Rayuan. Isu-isunya adalah: (1) sama ada Menteri telah melaksanakan budibicaranya di bawah s. 20(3) Akta Perhubungan Perusahaan 1967 ('Akta') apabila memutus untuk merujuk kes ke Mahkamah Perusahaan; (2) sama ada yang arif hakim silap berkaitan beban yang dipikul oleh Menteri apabila melaksanakan budibicaranya itu; (3) sama ada eks. LAL4 yang memberi ruang kepada responden-responden yang terjejas untuk diserap oleh syarikat-syarikat gabungan perayu telah disediakan tanpa pengetahuan perayu; dan (4) sama ada fakta bahawa responden-responden yang terjejas telah menerima faedah pengurangan pekerja merupakan satu estopel terhadap mereka.

Diputuskan:
Oleh Abdul Kadir Sulaiman HMR (majoriti)

[1] Di bawah s. 20(3) Akta Menteri mempunyai budibicara sama ada untuk merujuk ataupun tidak representasi yang dibuat oleh pekerja kepada Mahkamah Perusahaan sebaik sahaja ia menerima notifikasi dari Ketua Pengarah menyatakan kepuasan hatinya bahawa pertikaian tersebut berkemungkinan tidak dapat diselesaikan. Menteri akan hanya melaksanakan

budibicaranya untuk merujuk pertikaian ke Mahkamah Perusahaan 'jika beliau merasa wajar' untuk berbuat demikian. Jika tidak, beliau boleh menolak dari berbuat demikian. Sekiranya Menteri memutus untuk tidak merujuk pertikaian kepada Mahkamah Perusahaan, maka pekerja tidak mempunyai apa-apa jalan lain berhubung keterkilanannya terhadap majikannya.

[2] Adalah sesuai bagi Menteri untuk merujuk representasi kepada Mahkamah Perusahaan untuk suatu award setelah mendapati wujud isu serius yang perlu diputuskan berdasarkan fakta yang dikemukakan kepadanya. Rekod menunjukkan bahawa memang wujud isu serius yang hanya boleh diselesaikan oleh Mahkamah Perusahaan. Oleh itu, dalam usaha untuk melaksanakan kuasa-kuasanya, tiada apa lagi yang boleh dibuat oleh Menteri kecuali merujuk representasi kepada Mahkamah Perusahaan untuk suatu award.

[3] Yang arif hakim hanya membuat perbandingan berkaitan beban berat yang dipikul oleh Menteri apabila melaksanakan budibicaranya di bawah s. 20(3) Akta. Beliau tidak melakukan kesilapan ke tahap yang membolehkan rayuan di sini dibenarkan atas alasan itu. Lagipun, dalam alasan penghakimannya, yang arif hakim tidak membayangkan bahawa Menteri tidak perlu membuat kajian fakta yang terperinci sebelum merujuk kes ke Mahkamah Perusahaan. Kecualilah jika ianya jelas kepada Menteri bahawa sesuatu representasi itu bersifat remeh atau menyusahkan, beliau perlu meneliti fakta-faktanya dan membuat keputusan bagi menentukan nasib representasi tersebut.

[4] Memandangkan eks. LAL4 telah membuka ruang bagi penyerapan responden-responden yang terjejas ke dalam syarikat-syarikat gabungannya, hujah perayu bahawa ia tiada kawalan ke atas syarikat-syarikat tersebut bagi menyerap responden-responden yang terjejas adalah tidak bermerit. Lagipun, eks. LAL4 telah dikemukakan ke hadapan Ketua Pengarah sewaktu prosiding perdamaian. Oleh itu, tiada merit dalam hujah perayu bahawa eks. LAL4 telah disediakan secara sebelah pihak untuk responden-responden terjejas tanpa pengetahuannya.

[5] Fakta bahawa responden-responden yang terjejas telah menerima faedah pengurangan pekerja dari perayu tidak menjadi estopel terhadap mereka berhubung representasi yang mereka buat. Estopel tidak terpakai kepada adjudikasi perusahaan mengambilkira s. 30(5) Akta.

Oleh Abdul Aziz Mohamad HMR (menentang)

[1] Walaupun yang arif hakim berpuas hati bahawa keputusan Menteri adalah wajar dan betul, kandungan alasan penghakimannya tidak menampakkan bahawa suatu penelitian fakta yang terperinci telah dibuat. Penelitian secara terperinci akan dokumen-dokumen yang ada di hadapan Menteri telah menunjukkan suatu kes pengurangan pekerja yang *bona fide*. Sekiranya Menteri dan yang arif hakim menimbang apa yang didakwa dan dikatakan oleh responden-responden yang terjejas, mereka akan melihat bahawa pengataan-pengataan tersebut adalah remeh. Menteri telah mengambil perhatian akan pertimbangan yang tidak relevan, sekaligus gagal mengambilkira pertimbangan-petimbangan yang wajar diambilkira. Oleh itu, keputusan beliau harus dibatalkan dan rayuan dibenarkan.

Rayuan ditolak oleh majoriti.]

Case(s) referred to:
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan [1997] 1 CLJ 665 CA ***(refd)***
Marlin Rajiman & Ors v. MAA Services Sdn Bhd [1994] 2 CLJ 591 SC ***(refd)***
Minister of Labour, Malaysia v. Sie Seng Fatt [1990] 2 MLJ 9 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(2), (3)

For the appellants - Edward Saw (Andrew Saw); M/s Ng Yook Woon, Andrew TC Saw & Co
For the 1st respondent - Amarjeet Singh SFC

[Appeal from High Court, Kuala Lumpur; Originating Motions No: R2-25-110-1998]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Kadir Sulaiman JCA:
Before the High Court the appellant applied for an order of *certiorari* to quash the decision of the first respondent making an order under s. 20(3) of the Industrial Relations Act 1967 ("the Act") refering the dispute between the appellant and the second, third and fourth respondents, (the affected respondents), to the fifth respondent for an award on the ground that the first respondent had acted outside his jurisdiction or without any jurisdiction. The application of the appellant was dismissed by the High Court with costs. The appellant is dissatisfied with the said decision of the High Court. Hence this appeal to us.

On 13 March 2003 we heard the appeal and at the end of it by a majority decision (Abdul Aziz JCA dissenting) we dismissed the appeal. We now provide the reasons for such dismissal.

By s. 20(3) of the Act the first respondent is vested with the discretion to refer or to refuse the reference of representations made by a workman under sub-s. (1) to the fifth respondent for an award, upon receiving the notification of the Director General that the latter is satisfied that there is no likelihood of the representations being settled. Hashim Yeop Sani CJ (Malaya) (as he then was) in *Minister of Labour, Malaysia v. Sie Seng Fatt* [1990] 2 MLJ 9 at p. 12 said:

> So long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court, unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute. Otherwise he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious ... .

Pursuant to the aforesaid subsection, the first respondent's discretion would be exercised in favour of referring such representations to the fifth respondent only "if he thinks fit" to do so. Otherwise, he has every reason not to do so. In the word of the learned judge of the High Court in the present case: "In the event that the Minister decided not to refer the dispute to the Industrial Court, the worker or employee would be left without any other recourse concerning his grievances against the employer".

Speaking on the discretionary power of the Minister under s. 20(3) of the Act, Gopal Sri Ram JCA in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan and Another Appeal* [1997] 1 CLJ 665 has this to say at p. 708:

> Put simply, the first question which the Minister ought to ask himself is whether the way in which he proposes to exercise his discretion will have the effect of preventing or settling the particular dispute; for that is what the Act is primarily aimed at. However, as I have explained just a moment ago, this approach to the exercise of discretion is only a very general guide because a rigid adherence to it may result in every case being referred to the Industrial Court. That is certainly not what Parliament intended is manifested by its conferment upon the Minister of a discretion whether to refer, or not to refer, a representation to the Industrial Court.
>
> The second question that the Minister must ask himself is whether, objectively speaking, the representations made under s. 20(1) are frivolous or vexatious. If they are, then he may well be justified in refusing a reference. Whether they are or are not depends upon the facts of each case ...

A Court may, upon an objective assessment of the facts and material that was placed before the Minister, fairly come to the conclusion that the representation is, or is not frivolous or vexatious and hence merits reference to the Industrial Court for an award.

In conclusion, the learned JCA said at p. 714:

To summarize, when a question arises as to whether the Minister has correctly exercised his discretion under s. 20(3) of the Act, it is the solemn duty of a court to undertake a meticulous examination of the facts that were made available to the Minister. If the examination reveals that the representations made under s. 20(1) are neither perverse, frivolous nor vexatious, a decision not to refer is liable to be quashed by an order of *certiorari.*

Before proceeding further, there is one other authority which I consider to be of assistance. It is *Bombay Union of Journalists v. State of Bombay* [1964] 1 LLJ 351, where Gajendragadkar J made the following observation (at p. 354 of the report):

> It is true that if the dispute in question raises questions of law, the appropriate government should not purport to reach a final decision on the said questions of law, because that would normally lie within the jurisdiction of the Industrial Tribunal. Similarly, on disputed questions of facts, the appropriate government cannot purport to reach final conclusions for that again would be the province of the Industrial Tribunal. But it would not be possible to accept the plea that the appropriate government is precluded from considering even *prima facie* the merits of the dispute when it decides the question as to whether its power to make a reference should be exercised under s. 10(1) read with s. 12(5) or not. If the claim made is patently frivolous, or is clearly belated, the appropriate government may refuse to make a reference. Likewise, if the impact of the claim on the general relation between the employer and the employees in the region is likely to be adverse, the appropriate government may take that into account in deciding whether a reference should be made or not. It must, therefore, be held that a *prima facie* examination on the merits cannot be said to be foreign to the enquiry which the appropriate government is entitled to make in dealing with a dispute under s. 10 (1) of the Act.

It follows from these decisions that the Minister must bear in the forefront of his mind that the Act has established a special tribunal to adjudicate upon a dispute arising from representations made under s. 20(1) of the Act, and that it is therefore not part of his function to arrive at a concluded view upon the merits of the dispute. His role is limited to ascertaining whether, on the facts and material places before him, the representations raise serious questions of facts or of law calling for adjudication. And, as I have already said, his determination upon the question one way or the other is not conclusive.

Thus the issue here is whether in deciding to refer the representations of the affected respondents to the fifth respondent for an award, the first respondent has found it fit to do so in the sense that those representations are not frivolous and vexatious.

In coming to the conclusion that the first respondent has acted within his discretion to refer the representations of the three affected respondents to the fifth respondent for an award, the learned judge has this to say in his judgment at p. 24 of the record of appeal in encl. (21A):

> Based on the facts of the application before me I am satisfied that the decision of the Minister to refer the dispute to the Industrial Court was correct. The representations made by the Respondent No. 2, 3 & 4 cannot be considered to be vexatious and frivolous. There is serious issue that need to be tried by calling witnesses which issue cannot be properly determined by the Minister based purely on the report of the Director General. The serious issue that requires to be determined by the Industrial Court is the relationship between the Applicant company and Esso Malaysia Bhd. and other Esso Companies in Malaysia. The actual relationship between the Applicant and the Esso companies can only be determined if all the relevant documents such as the Memorandum and Articles of Association of each of the companies and also collective agreements between the Union and the companies are produced and the provisions properly argued. This can only be done by calling at least a representative of the Applicant to give evidence and be subjected to cross-examination by the Respondents. The Respondents must also be given the opportunities to bring in rebuttal evidence. This is a serious issue because it has bearing on whether Respondents No. 2, 3 & 4 can be relocated in any of the other Esso companies in Malaysia. As can be seen from the Affidavits produced by both parties there exist disputing claims in respect of such relationship. Exhibit LAL-4 as seen by the Minister, can give rise to such relationship whereby Respondents No. 2, 3 & 4 may be able to be relocated into the other Esso companies on Malaysia.

Finding of the existence of a serious issue to be resolved upon consideration of the facts presented to him pursuant to the notification of the Director General of unlikelihood of the representations being settled, it is fitting of the first respondent to refer the representations to the fifth respondent for an award. On our part in this appeal, having gone through the records we agree with the learned judge that there is indeed the serious issue which could only be resolved by the fifth respondent. Hence, in the proper exercise of the powers given to the first respondent, there is nothing left for him but to refer such representations to the fifth respondent for an award, which he did.

From the evidence of the first respondent as contained in his affidavit in reply to this application of the appellant for *certiorari*, he considered all the available evidence placed before him in deciding to exercise his discretion in favour of making a reference to the fifth respondent for an award. He considered the content of the documents exhibited to his affidavit as "LAL1", "LAL2", "LAL3", "LAL4" and "LAL5" respectively. The first three documents concern the terms of employment of the three affected respondents. There it was mentioned that since the appellant carries "on business throughout Malaysia and have other affiliates of the company, it is expected that you will be willing to work at any location or affiliate to which you may be assigned". In fact exh. "LAL4" provides avenue for the three affected respondents to be absorbed by the other affiliates of the appellant but instead they were being retrenched.

The learned counsel for the appellant in his written submission says that the learned judge has erred in law when referring to a passage in the judgment which is:

> On the other hand, by deciding to refer to the Industrial Court, the employer would not be in any way prejudiced to defend its decision. The employer would be completely free to assert that its action against the employee was lawful before the Industrial Court. Therefore, in the light of the above circumstances, I am of the view that the burden on the part of the Minister deciding to refer the dispute to the Industrial Court is very much less that deciding not to refer. For as long as he feels that there is a serious issue of law or issue of facts and law that requires to be determined then he is obliged to decide to refer the matter to the Industrial Court.

This is so because either way the Minister acts under s. 20(3) of the Act, it involves the exercise of his power. In our view, by such statement by the judge, he has not erred to the extent that this appeal ought to be allowed on that ground. This is because, the learned judge by so saying, was merely making a comparison on the onerous burden placed upon the Minister when called upon to exercise his discretion under the subsection. The learned judge was commenting on the various decided cases referred to him by both parties in their submissions before him on the *certiorari* application. This is what he says:

> On a perusal of the decisions of the cases mentioned above I have observed that the Court was particularly concerned with cases where the Minister had decided not to refer the dispute to the Industrial Court. This is clearly shown in the case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan*, where YA Gopal Sri Ram JCA said:

> Thus, when a question arises as to whether the Minister has correctly exercised his discretion under s. 20(3) of the Act, it is the duty of a Court to undertake a meticulous examination of the facts that were made available to the Minister. If the examination reveals that the representations under s. 20(1) are neither frivolous nor vexatious, a decision not to refer is liable to be quashed by *certiorari*.
>
> As I have said earlier, the Court would be more concerned and would take meticulous examination of the facts if and when the Minister decided not to refer the dispute to the Industrial Court. No mention of such meticulous examination of the facts would be made if the Minister decided to refer the dispute to the Industrial Court. In my view there is valid reason for the Court to react in such manner. In the event that the Minister decided not to refer the dispute to the Industrial Court, the worker or employee would be left without any other recourse concerning his grievances against the employer. That would virtually close the employee's claim against the employer. Therefore to arrive at that decision it is of utmost importance that the Minister must have given his fullest consideration of all the relevant facts available to him bearing in mind that a refusal to refer would deprive the employee of any future redress concerning his grievances, thus defeating the very purpose of Parliament enacting the Industrial Relations Act, 1967. On the other hand, ...

We do not think that by such expression, the learned judge is saying that the Minister would be properly exercising his discretion under s. 20(3) by not having to take meticulous examination of the facts at all when he feels like referring a representation to the Industrial Court. Unless it is clear on the face of it that a representation notified to him is of a frivolous or vexatious nature, the Minister would have to examine the facts so as to enable him to decide one way or another on the fate of the representation. In the matter before us now, we agree with the learned judge that the first respondent had properly exercised his discretion to refer the representations to the fifth respondent for an award.

It is also the submission of the learned counsel that, undeniably the appellant has affiliates in Malaysia but for all intent and purpose they are separate legal entities and as such has no control over the affiliates to absorb the three affected respondents on account of the shift of the operation of the appellant from the South Port to the West Port on a common user basis. That being the legal position, its surprising to note from "LAL4" of the intent of the appellant. Hence the submission has no merit.

The learned counsel also questions the authenticity of exh. "LAL4" being unilaterally prepared for the affected respondents without the knowledge of the appellant. But the fact remains that it was in the possession of the first respondent when making the decision to refer their representations to the fifth respondent. How could the said exhibit be in his possession? It must have come from the record of the Director General in the process of reconciliation pursuant to s. 20(2) of the Act prior to the notification made by him to the first respondent that there was no likelihood of the representations being settled. The matter contained in the said exhibit would surely be one of the topics brought for discussion by both parties before the Director General in the reconciliation proceeding before him.

It transpired that prior to the making of the representation under s. 20(1) of the Act, each of the affected respondent had been paid retrenchment benefit by the appellant. As such, the learned counsel submits that it acts as an estoppel against the affected respondent in relation to the representations. This argument, in our view, lacks merit as well because in the first place it is a legal issue as to whether an estoppel operates in industrial cases of this nature. This issue is not for the first respondent to make a decision being an administrative body as opposed to the fifth respondent being a judicial body created by the Act to decide on legal issue such as this. In any event, this matter was never placed before the first respondent for his consideration for purpose of him making his decision under s. 20(3) of the Act. In *Marlin bte Rajiman & Ors v. MAA Services Sdn Bhd* [1994] 2 CLJ 591 the respondent retrenched the appellants who later acknowledged by letter, the receipt of the retrenchment payments. They claimed that they did so under protest. They then made a representation to the Director General under s. 20(1) of the Act. The matter was notified to the Minister who referred the dispute to the Industrial Court. At the hearing before the Industrial Court, a preliminary objection was raised that they should be estopped from bringing the matter because they had already received their retrenchment payments. The Industrial Court dismissed their claim based on the preliminary objection. They then applied for *certiorari* to quash the award. The High Court decided that the Industrial Court committed an error going to jurisdiction because estoppel did not, under s. 30(5) of the Act, apply to industrial adjudication. The High Court confirmed the dismissal of the claim of the appellants. On appeal to the then Supreme Court, the appeal was allowed. Delivering the grounds of judgment of the Court, Eusoff Chin SCJ (as he then was) said at p. 592:

The Industrial Court's award stated that on the preliminary objection alone, the appellants' claim should be dismissed. The learned High Court judge when considering an application for *certiorari* to quash the award of the Industrial Court correctly decided that the Industrial Court committed an error going to jurisdiction because estoppel does not, under s. 30(5) of the Industrial Relations Act 1967, apply to industrial adjudication.

The learned judge, however, having scrutinized the Industrial Court's award, stated that the Industrial Court had in its award dealt with the merits of the case as well, and that was because the parties before the Industrial Court had argued on the issue whether the termination of the employment of the appellants was in fact retrenchment. The learned judge found that because the Industrial Court had dealt with the merits of the case, he confirmed the dismissal of the appellant's claim by the Industrial Court.

It is, therefore, clear from the authority just cited that in industrial matters such as this that estoppel does not apply to industrial adjudication in the light of s. 30(5) of the Act. Hence, this submission again lacks merit.

My learned brother Mokhtar bin Sidin, JCA, have read this judgment in draft and stated that he concurred with the reasoning and the conclusion.

In the circumstances, we have no alternative but to dismiss the appeal with costs and that the appeal deposit to be credited to the account of taxed costs.

Abdul Aziz Mohamad JCA:

On 27 November 1997 the appellant company issued letters to the second, third and fourth respondents ("the three workmen") giving them notice that their positions with the appellants had been made redundant with effect from 1 January 1998 and that therefore their services would no longer be required after 31 December 1997. The reason the appellants gave for the redundancy was that because the Port Kelang Authority had directed them to relocate their terminal at South Port in Port Kelang, where the three workmen were engaged, to West Port in Pulau Lumut (now Pulau Indah), they would no longer be operating a terminal at Port Kelang. In their letter the appellants said: "As you know we have made efforts to find you an alternative position within the organization but to no avail. It is for this reason, you have to be retrenched from the organization".

On 13 December 1997 the Director General for Industrial Relations ("the DG") received representations in writing from the three workmen. After taking steps to arrive at a settlement, the DG notified the Minister under s. 20(2) of the Industrial Relations Act 1967 that he was satisfied that there was no likelihood of the representations been settled. The Minister decided under s. 20(3) to refer the representations to the Industrial Court for an award.

The appellants applied to the High Court for an order of *certiorari* to quash the decision of the Minister. The High Court dismissed the application. The learned judge was satisfied that the Minister had made a proper decision to refer the representations to the Industrial Court.

The written representations of the three workmen were not before the High Court or this court. In view of the provisions of s. 20(1), however, they must have contended that they had been dismissed without just cause or excuse and have sought reinstatement in their former employment. But because the written representations were not in evidence, there was no evidence of the actual reasons given by the three workmen in their written representations for contending that they had been dismissed without just cause or excuse.

The learned judge approached the appellants' application on the basis that "the court was particularly concerned with cases where the Minister had decided not to refer the dispute to the Industrial Court". He said, generally, that that was what he observed on a perusal of the cases cited by both sides to him, but in particular he said that what he observed was clearly shown in a passage by Gopal Sri Ram JCA in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan* [1997] 1 CLJ 665. The passage that was quoted was holding (4) in the headnote. I shall, however, quote the actual words of Gopal Sri Ram JCA at p. 714:

> To summarize, when a question arises as to whether the Minister has correctly exercised his discretion under s. 20(3) of the Act, it is the solemn duty of a court to undertake a meticulous examination of the facts that were made available to the Minister. If the examination reveals that the representations made under s. 20(1) are neither perverse, frivolous nor vexatious, a decision not to refer is liable to be quashed by an order of *certiorari.*

After quoting holding (4), the learned judge went on to say:

> As I have said earlier, the Court would be more concerned and would take meticulous examination of the facts if and when the Minister decided **not** to refer the dispute to the Industrial Court. No mention of such meticulous examination of the facts would be made if the Minister decided to refer the dispute to the Industrial Court.

The judge obviously read the passage to mean that a meticulous examination of the facts that were available to the Minister is required of the court only when the Minister decided not to refer representations to the Industrial Court, and is not required where, as in this case, the Minister decided to refer representations to the Industrial Court. I thought that that was an incorrect reading of the passage and that therefore the learned judge had taken the wrong

approach to the application. The first sentence of the passage applies whenever a question arises whether the Minister has correctly exercised his discretion under s. 20(3), that is, his discretion to refer or not to refer. The court has to undertake a meticulous examination of the facts. The purpose of the meticulous examination is to see whether the representations of the workman are perverse, frivolous or vexatious. Some consequence must arise from the result of the meticulous examination, depending on whether it reveals that the representations are perverse, frivolous or vexatious or it reveals that they are not. The second sentence of the passage speaks only of the consequence from a revelation that the representations are neither perverse, frivolous nor vexatious in a case of a decision not to refer, probably because that case was a case of such a decision. The decision is then liable to be quashed. But the second sentence does not mean that in the case of a decision to refer, a meticulous examination of the facts is not required. The requirement, as I said, is in the first sentence. And the meticulous examination may reveal that the representations are perverse, frivolous or vexatious in a case of a decision to refer. The result must be that the decision to refer is also liable to be quashed.

I was of the view, based on the passage cited by the learned judge, that he ought to have undertaken a meticulous examination of the facts available to the Minister in this case to determine whether the representations of the three workmen were or were not perverse, frivolous or vexatious. Although at pp. 11 and 15 of his grounds of judgment, when he said that he was satisfied that the decision of the Minister was correct and proper, he said that his satisfaction was based "on the facts of the application" before him and on the documents that had been made available to the Minister, the contents of the grounds of judgment were not demonstrative of a meticulous examination of the facts having been undertaken. The judge merely said that the representations could not be considered frivolous or vexatious because there was a serious issue to be determined by the Industrial Court as to the relationship between the appellant company and the Esso Companies in Malaysia, that there were "disputing" claims as to the relationship, and that the Minister viewed an exhibit, exh. LAL4, as capable of showing the existence of such a relationship between the appellant company and the Esso Companies in Malaysia as would enable the three workmen to be relocated in any of the Esso Companies in Malaysia. I shall have something to say about exh. LAL4 later.

In support of their application to the High Court, the appellants had exhibited several documents that they had not presented for the purpose of a settlement by the DG under s. 20(2) and therefore had not been within the Minister's knowledge when he made his decision under s. 20(3). But a meticulous examination of only the documents that were available to the Minister, which the Minister averred he did take into consideration, would have revealed the

following facts about, firstly, the relationship between the appellant company and the Esso Companies in Malaysia and, secondly, the events leading to the giving to the three workmen of the notices of retrenchment that I mentioned at the outset.

As to the relationship, according to exhs. GHT8 and GHT11 the Esso Companies in Malaysia comprise Esso Production Malaysia Inc, Esso Malaysia Berhad ("EMB") and Esso Borneo Sdn Bhd but do not include the appellant company, the appellant company is a wholly-owned subsidiary of Exxon Chemical Eastern Incorporated, a company incorporated in the United States of America, and there is no reporting relationship between the appellant company and the Esso Companies. Exhibit GHT8 is an official Esso publication. Exhibit GHT11 comprises information officially forwarded by the appellants by their letter dated 13 July 1998 to the Industrial Relations Department to show that Esso and the appellant company "are two separate legal entities and managed differently worldwide". Since it relates to a point that I shall deal with later, I think that I should quote, from the information supplied, the following bit of information concerning a common collective agreement.

> ECMSB and EMB have a similar agreement with NUPCIW. It was mutually agreed in early 1980 that because ECMSB is a very small company with only 18 employees, it could not afford the resources to negotiate individually with NUPCIW for a separate Collective Agreement. NUPCIW, ECMSB and EMB then agreed that the terms and conditions of the EMB-NUPCIW Collective Agreement would also apply to the agreement between ECMSB and NUPCIW. Prior to the present Collective Agreement, ECMSB had a separate agreement with NUPCIW.
>
> The common Collective Agreement does not in anyway affect the way in which EMB and ECMSB are managed. Each is managed separately from the other and there is no reporting relationship between the two companies.

In that bit of information, ECMSB is the appellant company and NUPCIW is the National Union of Petroleum and Chemical Industry Workers ("the Union") of which the three workmen were members.

As to the events leading to the notices of retrenchment, the documents available to the Minister should have revealed to him the following.

On 4 November 1991, the Port Kelang Authority ("the Authority") gave written notice (GHT2) to the appellants to move the appellants' terminal from South Port in Port Kelang to West Port in Pulau Lumut (now Pulau Indah) by 1 January 1994, the date when West Port was expected to be ready and to

start operating. The reason given for the relocation was the policy of the Selangor Government that all petrochemical industrialists be relocated in Pulau Lumut.

Although the Authority had made an offer of land to the appellants for their operation in West Port, the Authority had taken "the strong view that the terminal facility at West Port should be managed on a 'common-user' basis". This would have been apparent from the Authority's letter to the appellants dated 27 August 1993 (GHT3), almost two years later, by which the Authority requested the appellants to therefore consider "either teaming up with the common-user operator at West Port or lease the facilities developed by this operator".

On 9 May 1994, after the original deadline of 1 January 1994, the Authority informed the appellants (GHT4) that they had not yet been able to get any party to operate on a common-user basis at West Port and therefore the appellants were allowed to continue to operate at South Port.

On 15 May 1997 there was a briefing given by the appellants' management to the Union at which the Union was briefed as to the events leading to the impending closure of the appellants' terminal in South Port. According to the minutes (GHT13), the following happened at the briefing. The management informed the Union that as it was not cost-effective for the appellants to set up a new terminal at West Port, the appellants would be leasing "tankages" from a multi-user terminal, whose operator would be handling all operational matters related to the running of the terminal, with the result that the three workmen would be redundant. The management further informed the Union that they had briefed the workmen and that they had discussed with them issues that included the questions of their redeployment, of their retrenchment benefits and of the possibility of employment with the operator of the multi-user terminal. As to redeployment, the management explained that they had approached EMB for possible redeployment, but had been officially informed that EMB could not accommodate the three workmen, and that the appellants and EMB being separate entities that reported to different managements, the appellants could not force EMB to accept the three workmen. As to employment by the operator of the multi-user terminal, the management explained that they had approached the operator to assess their willingness to employ the three workmen, but the operator had not given any commitment.

The Union informed the management that the three workmen's first preference was to continue employment in "the Esso family" but, failing that, the Union requested the management to consider additional compensation. The

management's response was that the "base case" retrenchment benefits would be according to the collective agreement and that they could not give an assurance of additional benefits but would review the request with the regional management.

As to the date of closure of the appellants' terminal, the management said that they expected all major operations would cease by end of October 1997.

On 20 May 1997 the appellants issued to the Chairman of the Union a notice (GHT14) that was said to be given "consistent with" art. 70 (Redundancy) of the collective agreement between the appellants and the Union. It said that following the direction of the Authority, the appellants' terminal would cease operations at South Port and that their operations would be moved to a common-user terminal to be operated by a third party at West Port. The move was expected to be completed by end of October 1997. The notice said that the three workmen would "be surplus to need in the common user terminal, which are manned by workers employed by the owners of the common user terminal".

On 20 October 1997 a meeting was held at which the Union and the appellants' management reached an agreement. The matters agreed upon were summarized in a letter dated 18 December 1997 from the appellants to the Union (GHT16), headed ECMSB PORT KELANG TERMINAL CLOSURE – AGREEMENT WITH UNION. Among the matters agreed were that as there were no alternative suitable positions to which to redeploy the three workmen, the appellants had no option but to retrench them with effect from 31 December 1997; that retrenchment benefits would be in accordance with art. 70 (Redundancy) of the collective agreement (GHT18); that the appellants would send out a letter by end of November or early December notifying the three workmen of their retrenchment. The letter ended with an expression of appreciation and gratitude to the Union for its co-operation "in resolving the issue".

On 27 November 1997 the appellants issued to the three workmen the retrenchment letters that I mentioned at the outset. It is exh. GHT17. I need only add that the reason for the redundancy given in the letters was as "advised in our earlier meetings and discussions with you and your Union". The letters also said that the workmen would be paid redundancy benefits in accordance with the collective agreement. On 29 and 30 December 1997 the appellants sent to the three workmen a computation of the amounts due to them as a result of their ceasing to be employees of the appellants from 1 January 1998.

The events that I have related, which are evidenced by documents available to the Minister, show that the relocation of the appellants' terminal to West Port was a matter beyond their control, that because the appellants' requirements at West Port were to be supplied by the common-user operator the services of the three workmen for the purposes of the appellants' operations at West Port became redundant, that the appellants had endeavoured to find other positions for them but no position was available, that the appellants and the Esso Companies were separate legal entities under separate managements and therefore the Esso Companies could not be compelled to absorb the three workmen, and that all that was accepted by the Union and, through the Union, by the three workmen in the agreement reached on 20 October 1997. It was a clear-cut case of a *bona fide* retrenchment, which a meticulous examination of the documents available to the Minister would have revealed to the judge. Since the judge took into consideration what the Minister said in his affidavit that was before the judge, I proceed now to set out what the Minister said.

The Minister stated several things from which he concluded in para. 18 of his affidavit that there were issues of law and fact to be determined, and that therefore the workmen's representations (the nature of which was not stated) were not frivolous and vexatious. The things that the Minister stated were in paras. 11, 12, 13, 14, 15, 16 and 17.

In para. 11 the Minister said that the DG had reported to him that the three workmen had informed him, the DG, that they had not been informed that there were no vacant positions in the Esso Companies in Malaysia and had alleged that the appellants had failed to take the initiative to relocate them to other positions in the appellant company or the Esso Companies. As to being informed of the non-existence of vacancies in the Esso Companies, the Minister would have seen from exh. GHT13 that on 15 May 1997 the Union was informed that EMB could not accommodate the three workmen. The Union being informed, the workmen would have been informed through the Union. Exhibit GHT13 being official minutes of a meeting, the Minister would have had no reason, and no reason was suggested by anyone, for doubting the truth of what was recorded in them. As to initiative to relocate the workmen in the Esso Companies, the Minister would have seen from exh. GHT13 that the appellants had approached EMB for possible redeployment. The Minister further would have seen from exhs. GHT8 and GHT11 that the appellant company was a separate legal entity from the Esso Companies and would not have been in a position to foist the three workmen on them. As to employment in another position with the appellant company, it would have depended on the existence of vacant positions to which the three workmen could have been suitably relocated consistently with the needs of the appellants, and if the workmen

wished to contend that there was an issue as to that, they had to say it and show something in support of it that could provide a reason for thinking that the issue ought to be determined by the Industrial Court, but it was not sufficient to merely complain that the appellants had failed to relocate them in other positions. Had the Minister, and the judge, considered what according to the DG the three workmen had stated and alleged, as stated in para. 11, after a meticulous existence of the documents available to the Minister, they would have seen that the statement and allegation were frivolous.

In paras. 12 and 13, the Minister stated that in the letters of appointment of the three workmen the appellants had stated that they carried on business throughout Malaysia and that the three workmen were expected to be willing to work in any part of Malaysia. That, however, was merely a caveat to reserve to the appellants the right to relocate the workmen anywhere should the need arise. It was not a guarantee or a representation for their benefit that a position would always be available for them in some part of Malaysia.

In para. 17 the Minister stated that he had been informed by the DG that the collective agreement showed that there was some relationship between the appellants and EMB. But if the Minister had read the information given by the appellants in exh. GHT8 that I have quoted about the appellants sharing the same collective agreement with EMB, he would have seen the reason for it and that it was not such a relationship as would enable the appellants to foist the three workmen on EMB. The Minister would have seen no reason to reject the quoted explanation. The Minster further stated in para. 17 that the existence of the relationship was supported by the fact that in the meeting between the appellants' management and the Union on 15 May 1997 and in another meeting, one Encik Bon Sian Son, an officer from EMB, participated as one of the three representatives of the management. It will be recalled that at that meeting the management explained that the appellants and EMB were separate entities reporting to separate managements and therefore the appellants could not force EMB to accept the three workmen. Had the Minsiter given a thought to the matter, he would have considered that if the management had intended to give an untrue explanation they would not have included in their team an Esso man whose participation in the team could provide cause for suspicion that the information was not true, and that there must be some other explanation for Encik Bon's being part of the management team than that, contrary to the explanation given, there was such a relationship between the appellants and EMB as would have enabled the appellants to make EMB take on the three workmen. And before the judge there was such an explanation, in para. 24 of the appellants' affidavit in reply to the Minister's affidavit. The

explanation was that Encik Bon was the Industrial Relations Officer of EMB and his presence at that meeting and other meetings was pursuant to an agreement whereby the appellants bought industrial relations services from EMB.

I have jumped paras. 14, 15, and 16 of the Minister's affidavit because these were the paragraphs that referred to exh. LAL4 that I mentioned before and I feel that it would be convenient to deal with them last because before dealing with what the Minister said in those paragraphs I have something to say about that exhibit.

The Minister introduced that exhibit in para. 14. He described it as a statement ("kenyataan") of the Union. He introduced it with the words "Saya juga telah meneliti" the statement. The statement was headed Background to EssoChem Lay Off" and was not dated. It was not the minutes of any meeting. It was not from any offcial publication. It was not signed by anybody. It contained five paragraphs of scraps of information and a final paragraph stating that the appellants should make an effort to absorb the three workmen "in Esso Tasek Plant or in Esso Refinery Port Dickson". The appellants, in para. 14A of their affidavit in reply, said this through their managing director about the exhibit:

> I state that it is within my personal knowledge that this document was never at any time forwarded to the Company and as such it was never within the Company's knowledge. Nevertheless, with the benefit of sighting it at this late stage, I verily state that exhibit "LAL-4", a unilateral statement left unchecked for its veracity, is full of inconsistencies and inaccurate …

The Minister's affidavit, which exhibited LAL4, was dated 23 December 1998. According to para. 4 of the Minister's affidavit, it was on 17 August 1998 that the DG notified the Minister under s. 20(2) of the unlikelihood of the representations being settled. I inferred from the quoted statement in the said para. 14A of the appellants' affidavit, particularly from the mention of sighting of the exhibit "at this late stage", that it was only from the Minister's affidavit that the appellants came to know of the exhibit and that therefore it had not been available to the Minister when the DG reported to him on 17 August 1998. There had been no reply to the appellants' affidavit to explain when and how the exhibit came to be made available to the Minister so as to falsify the inference that it came to the Minister otherwise than in the course of the efforts at a settlement under s. 20(2).

I need not state what the appellants stated in their affidavit to be the inconsistencies and inaccuracies in the exhibit because stating it is not necessary for dealing with the matters that the Minister actually stated in his affidavit about the exhibit.

In para. 14 the Minister said that the statement, that is exh. LAL4, showed "penyerapan pekerja dari 'plant' yang telah ditutup". That was the only material thing that he said in that paragraph. He did not say how the information operated on his mind. He was obviously referring to para. 3 of the statement which set out three instances of closure of EMB plants where the affected workers were absorbed in other places. If the Minister had said that those instances showed that the three workmen in this case might have been absorbed in the Esso Companies he would have been in error because the instances were instances of relocation within the Esso Companies and not instances of employees of the appellant company, which according to reliable material before him was not an Esso Company, being relocated in an Esso Company.

In para. 15 the Minister referred to a statement in para. 4 of exh. LAL4 and a statement in the appellants' letter to the Union dated 18 December 1997, already mentioned, summarizing the agreement reached between the appellants' management and the Union. The statement in para. 4 of LAL4 was this: "ECM at meeting with Union on 29 December 1997 informed that they had no obligation to absorb the 3 ECM employees in other affiliates". ECM was the appellant company and 29 December 1997 was also the date on which the appellants gave to the three workmen statements of the amounts due to them upon retrenchment. The statement in the appellants' said letter, which was in para. 1, was this: "As there were no alternative suitable positions to redeploy the three (3) employees, the company had no other options but to retrench them with effect from 31 December 1997". The Minister, however, while seeming to imply in para. 15 that the two statements were inconsistent, did not say in that paragraph what to him the inconsistency was and what it meant to him. Having no obligation to absorb the workmen was not inconsistent with making efforts all the same to absorb them.

Paragraph 16 of the Minister's affidavit had to do with the letter dated 18 December 1997, already mentioned, from the appellants to the Union minuting the agreement reached on 20 October 1997 between the appellants' management and the Union. That letter had been exhibited by the appellants (exh. GHT16) in support of their averment in para. 18 of their affidavit in support of their application that "it was at this meeting that the issues of redundancy were finalised with the (Union)". In his para. 16 the Minister said that exh. LAL4 showed otherwise. There was actually nothing in that exhibit that ought to make the Minister doubt the genuineness of the letter dated 18 December 1997 and the truth of the matters minuted in it. What the Minister meant as being shown by the exhibit was nothing more than that after and despite the agreement with the Union on 20 October 1997 the three workmen refused to let the matter rest, a fact which the Minister would have recognized from the mere fact of the three workmen making representations under s. 20(1) without even having

to be shown it through exh. LAL4, a fact which of itself could not render the representations or the presumed dissatisfaction behind them as something that was neither perverse, frivolous nor vexatious.

Those then were the matters from which the Minister said he found that there were questions of law and fact to be decided. Had the Minister given careful thought to those matters in the light of the documents available, he would have seen, as I have attempted to show, that there was nothing in them. The Minister, therefore, in arriving at his decision to refer the three workmen's representations to the Industrial Court, had taken into account irrelevant considerations, thereby failing to take into account the proper considerations that should have weighed on his mind. For that reason I was of the view that his decision ought to have been quashed and that the appeal ought to be allowed.